SUPREME COURT OF APPEALS OF VIRGINIA.

WESTERN UNION TELEGRAPH CO. *v.* WHITE.

March 14, 1912.

[74 S. E. 174.]

1. Telegraphs and Telephones (§ 78*)—State Regulation—Statutes—Interstate Business.—Where the points of transmission and destination of a telegram sent over the lines of a single company were within the state of Virginia, the fact that the telegraph company, in transmitting the message, sent it to a relay office in the District of Columbia, did not render the transmission interstate business, nor prevent the application of Code 1904, § 1294h, imposing a penalty of $100 for failure of a telegraph company to promptly transmit and deliver messages.

[Ed. Note.—For other cases, see Telegraph and Telephones, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

2. Telegraphs and Telephones (§ 78*)—Messages—Failure to Deliver—Penalties—Statutes.—Code 1904, § 1294h, imposing a penalty for failure of a telegraph company to promptly transmit and deliver prepaid messages, accepted for transmission, etc., in so far as it applied to the transmission and delivery of intrastate messages, was valid, in the absence of any congressional regulation of the subject.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 79-81; Dec. Dig. § 78.*]

Keith, P., and Cardwell, J., dissenting.

Appeal from Corporation Court of Fredericksburg.

Action by Fannie C. White against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

St. Geo. R. Fitzhugh and *A. L. Holladay,* for appellant.
W. W. Butzner, for appellee.

BUCHANAN, J. This is an action to recover the statutory penalty of $100 provided by clause 5, § 1294h of Virginia Code 1904, for failure by the Western Union Telegraph Company to transmit to Fredericksburg a prepaid message accepted for transmission at that company's office at Staunton.

[1] It appears that the message was promptly transmitted from Staunton to the Company's relay office in the city of Washington, D. C., received at that office, but never transmitted to the Fredericksburg office.

The question involved in this case is substantially the same

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

as that involved and decided in the cases of Western Union Telegraph Company *v.* Reynolds, 100 Va. 459, 41 S. E. 856, 93 Am. St. Rep. 971, and Same Company *v.* Hughes, 104 Va. 240, 51 S. E. 225. Since those cases were decided there has been no decision of the Supreme Court of the United States (the court of last resort upon the question involved) upon the precise question in issue in this case, nor is there anything in the cases decided by that court since that time which seems to militate against the conclusion reached in the Reynolds and Hughes Cases.

In Western Union Telegraph Company *v.* Commercial Milling Company, decided in November, 1910, and reported in 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 21 Ann. Cas. 815, a telegram was accepted at the company's office at Detroit, Mich., to be delivered at Kansas City, Mo. The message, which was an acceptance of an offer to sell wheat, was promptly transmitted to the company's relay office in Chicago, Ill. What became of it afterward is not shown, but it was never delivered. An action for damages for failure to deliver the message in Kansas City was brought in the state of Michigan, and upon appeal the validity of a statute of that state was upheld, as not being in conflict with the commerce clause of the Constitution of the United States. That statute (Pub. Laws 1893, No. 195) is as follows:

"Section 1. The people of the state of Michigan enact that it shall be the duty of all telegraph companies incorporated either within or without this state, doing business within this state, to receive dispatches from and for other telegraph companies' line and from and for any individual, and on payment of the usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph company, to transmit the same with impartiality and good faith. Such telegraph companies shall be liable for any mistakes, error or delays in the transmission or delivery or for the nondelivery of any repeated or nonrepeated message, in damages to the amount which such person or persons may sustain by reason of the mistakes, errors or delays in the transmission or delivery, due to the negligence of such company, or for the nondelivery of any such dispatch due to the negligence of such telegraph company or its agents, to be recovered with the costs of suit by the person or persons sustaining such damage."

In that case, in discussing the difference between the Pendleton Case, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, and the James Case, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, Mr. Justice McKenna said, at 218 U. S. 419, 420, 31 Sup. Ct. 63 (54 L. Ed. 1088, 21 Ann. Cas. 815): "A statute of Georgia, which required telegraph companies having wires

wholly or partly within the state to receive dispatches, transmit, and deliver them with due diligence under the penalty of $100, was sustained as a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state. It will be observed that this case in some particulars exhibits a contrast to W. U. Tel. Co. v. Pendleton, supra, and yet they are entirely reconcilable, having a common principle. In the latter case the law passed on clearly transcended the power of the state, because it directly regulated interstate commerce, as we have already shown. In the James Case the power of the state was exercised in aid of commerce. In the latter case prior cases were reviewed, and the principle determining the validity of the respective statutes was declared to be whether they could be 'fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states.' It was said that a statute of that kind, as it would not 'unfavorably affect or embarrass' the telegraph company in the course of its employment should be held valid 'until Congress speaks upon the subject,' and it was observed that 'it is a duty of a telegraph company, which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor.' And there can be liability to the sender of the messaire, as well as to him who is to receive it. The telegraph company in the case at bar surely owed the obligation to the milling company not only to transmit the message, but to deliver it."

It will be observed in the above quotation it is said that "the principle determining the validity of the respective statutes was declared to be whether they could be 'fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states.' " Applying that principle or rule laid down in that case for the determination of the validity of our statute to the facts of this case, its validity would seem clear. The statute imposed no additional duty upon the telegraph company in requiring it to transmit the message to the office of the sendee. It was the clear duty of the company to do this independent of the statute.

Treating the message in question as interstate, since its regular course from Staunton to Fredericksburg, in accordance with the regulations of the company, was through the District of Columbia, though the message could have been transmitted from Staunton to Fredericksburg over the company's lines entirely within this state, the statute affects the transmission of inter-

state commerce. But, as was said in the James Case, supra, 162 U. S. 660, 16 Sup. Ct. 938 (40 L. Ed. 1105): "Such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it. But the statute can be fully carried out and obeyed without in any manner affecting the conduct of the company with regard to the performance of its duties in other states. It would not unfavorably affect or embarrass it in the course of its employment, and hence, until Congress speaks upon the subject, it would seem that such a statute must be valid."

What is said in that case as to the Georgia statute is equally true of our statute. It contains no requirement, as did the Indiana statute involved in the Pendleton Case, supra, which could in any manner affect the conduct of the company with regard to the performance of its duty in another jurisdiction. W. U. Tel. Co. *v.* Crovo, 220 U. S. 364, 31 Sup. Ct. 399, 400, 55 L. Ed. 498.

The fact that the failure to transmit the message to Fredericksburg was the result of negligence at the company's relay office in Washington city furnishes no better reason for holding that the company is not liable to the penalty for failing to transmit than did the fact that the negligence which caused the message not to be delivered in the Milling Company Case, supra, was in a state other than the state of Michigan, whose statute was involved and where suit was brought for the violation of the statute.

[2] It is not sought in this case to give effect to our statute outside of the limits of this state as was held could not be done in the Chiles Case, 214 U. S. 274, 29 Sup. Ct. 613, 53 L. Ed. 994; but the object of the suit is to give effect to the statute and to impose the penalty for the company's failure to transmit the message to Fredericksburg. If the message had never been transmitted at all from Staunton, it is clear, under the case of Western Union Telegraph Co. *v.* Grovo, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, the company would have been liable. If the point of delivery had been in Washington city, and the message had been duly transmitted to that place and never delivered, then there could be no recovery, as decided in the Chiles Case, supra. If the message had been duly relayed and transmitted from Washington city to Fredericksburg, and the only default had occurred there in failing to deliver the message to the sendee, it is clear that an action would lie to recover the penalty under the decision in the James Case. Why, then, since there was default in the failure to transmit the message from one point in this state to another point in the state, should the statute not be enforced and the penalty imposed,

for it was as clearly the duty of the company to transmit the message to Fredericksburg as it was to transmit the message from Staunton? The fact that the company was negligent in Washington city in receiving or transmitting the message ought not to protect it from the penalty for its default in failing to transmit the message to Fredericksburg.

We are of opinion that this case is controlled by the Reynolds and Hughes Cases, supra. This court will therefore adhere to its former decisions and dismiss the writ of error for want of jurisdiction.

KEITH, P., and CARDWELL, J., dissent

Note.

Dissenting Opinions.—This case suggests again a question dealt with by our editor in chief in XII Va. Law Reg. 930, i. e., Is a dissenting opinion of any value? In this editorial he leaves us in doubt as to his position on this question; however, it is certainly refreshing to see an occasional dissent, especially as so many burning questions, such as the validity of common-law marriages, etc., have been dismissed by our court with a unanimous opinion. We can depend on the courts to refrain from frivolous dissents and in addition to the "comfort they afford the losing side," we do not think that their value can be denounced broadly, for we call to mind one instance in Thompson on Negligence in which that learned commentator characterized the majority opinion of our readjuster court as the "mouthings of the court" and added that the true rule was contained in Judge Lewis's dissenting opinion. And that luminous and courageous dissent of the late Justice Harlan in the Standard Oil case recently decided should silence once and for all time those that are disposed to scoff at the value of such opinions. He not only made a masterful appeal for an adherence to the rule of stare decisis, but justly rebuked the court for that colossal piece of judicial legislation and reminded them that in so doing they were infringing on the legislative branch of the government, so wisely declared by the constitution to be separate and distinct from the judicial branch, and to be kept so. Unfortunately, in the principal case, the judges that dissented did not file any written opinions and we are deprived of their reasons for disagreeing with the majority opinion. It is a matter of regret, especially as the court may at some future date change its position.

As a precedent this case is of little value since the precise proposition has been passed on before. Besides it would not seem to be interstate commerce at all where the sending and receiving points are within the same state, although it may enter a foreign state in the course of its journey. Chief Justice Marshall, in Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. Ed. 23, said that the words "commerce among the states" do not comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state and which does not extend to or affect other states.